APPEAL NO. 990380

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 21, 1999. The issues at the CCH were whether the appellant/cross-respondent, who is the claimant, sustained a compensable injury on _____; whether he had disability as a result of that injury and, if so, for what period; and whether the respondent/cross-appellant (carrier) was discharged from liability for the claim because timely notice was not given to the employer. If timely notice was not given, the existence of good cause was also a matter for consideration by the hearing officer.

The hearing officer found that the claimant injured his back on _____. He found that claimant did not give a clear notice of injury to his employer within 30 days, but had good cause for the failure to give timely notice because he trivialized his injury. The hearing officer also found that claimant had some disability, but that it ran only from October 9 through November 18, 1998.

Both parties have appealed. The claimant appeals the disability finding, stressing that he has not been released back to work yet. He disputes that there was any medical basis for the hearing officer to find that the claimant could return to "full duty" on November 18, 1998, and that the private investigator's observations do not constitute sufficient evidence on which to base a finding that disability ended. Claimant seeks to have disability continued through the date of the CCH. The carrier responds by referring to its own appeal in which the carrier contends there was no period of disability. The carrier's appeal takes issue with the findings that the claimant sustained a compensable injury or had disability therefrom. The carrier further argues that claimant did not act as a reasonably prudent person would, with testimony of continuing back pain for months, in reporting his injury. The carrier also argues that the claimant's contention was timely reporting so there is no evidentiary basis for finding good cause for untimely notice. The claimant responds that there is sufficient basis for the findings of the hearing officer and for at least the period of disability found by the hearing officer. The claimant also notes that timely notice was given in the first aid notebook, but, in the alternative, good cause existed if notice was untimely.

DECISION

Affirmed. As to the notice issue, the holding that carrier is not discharged is affirmed based on the record indicating timely notice to the employer, or good cause in the alternative.

The claimant was employed by (employer) as a laborer on the date of his claimed injury, _____. The claimant said he was one of several employees charged with loading 94-pound bags of cement onto pallets. On the date in question, he was on the back of a truck with another employee, performing this task, when the driver "popped" the gears several times, jarring the claimant's back. Claimant said he felt a "pop." Claimant said he told his supervisor, Mr. S, about this at the time, and asked for permission to go to the first

aid station for medication, where he said he logged his injury into the first aid log. He testified that it was his understanding that this log was reviewed daily by supervisors, and was one method by which injuries were reported. He said that any injuries for which one went to the first aid station were required to be logged in here.

Claimant said he continued to work for the next several months, in pain, treating himself with heat and over-the-counter pain medication. He periodically went to the first aid station and logged out medication. The claimant said that finally, in early October 1998, the pain was bad enough to seek medical treatment and he went to Mr. T, asking for permission to see a doctor. He was taken to Dr. E, whom he said took a couple of x-rays, told him he had a lumbar sprain, and sent him off. He was released to light duty, but claimant contended the light-duty work was not true light duty and still involved lifting cement. He subsequently sought treatment from a chiropractor, Dr. S, and was taken off work entirely.

The benefits manager for the employer, Ms. M, testified that she first found out about the work-related injury in October, when Mr. T called and reported that claimant needed to see a doctor. She agreed that claimant first filed for workers' compensation, and then filed under the private disability policy. Ms. M stated that the first aid log was not reviewed daily, but she felt it was likely reviewed monthly so that safety problems could be identified or supplies reordered. She said the purpose was to log out supplies, not report injuries. She had reviewed the entry for _____, and agreed that claimant wrote that he "experienced muscle pain in his back due to sacking." (We do not agree that the summary of facts in the decision fully states the substance of Ms. M's testimony on this point.) Ms. M agreed that it was the supervisor's discretion whether to formally report a "no lost time" injury such as a cut finger or muscle pull. She agreed that it was likely that some injuries of which a supervisor was aware, of this nature, had not been called to her attention or that of Mr. T, to whom injuries were also supposed to be reported. Ms. M said that there were plant safety awards but they were in the nature of caps and tee shirts.

Mr. B, the vice president for manufacturing, testified that claimant had had attendance problems prior to _____. In addition, Mr. B said that claimant had contended that a woman to whom he was not married was his spouse, which created some problems. He also stated that the employer had a wide variety of light-duty programs, and that he and Ms. M made many attempts to get with claimant's doctor about whatever claimant could do. Dr. S finally talked with Mr. B after he had not completed a functions worksheet that he was sent by the employer, and stated that claimant could not work. Mr. B indicated that he could not get specific information from Dr. S about what claimant could and could not do. Mr. B said that he first found out that claimant was taken off work when claimant did not show up, and Mr. B got in contact with him. He agreed that the injury reporting policy was tailored specifically to injuries involving doctor visits or lost time.

Mr. B stated that he used the log book to record injuries himself, and that the information in that document was useful for statistics on injury or safety concerns. Mr. B denied that any employee would actually lift or carry 94 pounds, and they would merely

guide such a sack off a conveyor onto a pallet. Mr. B said that permission was not required to go to the first aid station and employees could go on their own.

A videotape was made of claimant around November 18, 1998, showing him performing a variety of tasks, including bending and stooping to wash his car. A private investigator testified that he also saw the claimant doing laundry. Medical records show that Dr. S stated on November 16, 1998, that claimant was not "medically stationary" but that he had decreased spinal range of motion. Dr. S's notes from October through December record complaints of persistent pain, and muscle spasms, but do not record a diagnosis as such. His December 14, 1998, Specific and Subsequent Medical Report (TWCC-64) records lumbar facet syndrome and cervical and thoracic sprain.

Dr. C examined the claimant on January 4, 1999, and found evidence of symptom magnification and no objective evidence of impairment. Claimant said that Dr. S stopped treating him in December 1998 because of nonpayment. Claimant said he had not been released by any doctor to any level of work duty, but it was his intention to go back to work as soon as he could, after the proper medical treatment.

Notwithstanding considerable testimony about the first aid log, no one put a copy of the entry made on the date of injury in evidence. The most detailed testimony about the wording on that date was from Ms. M; Mr. B stated that he did not really dispute that claimant recorded his injury on that date and the basis for his dispute was that claimant did not verbally tell a supervisor.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). His determination that the claimant sustained a strain in the manner he claimed was supported by sufficient evidence. We cannot agree that this determination was against the great weight and preponderance of the evidence. Likewise, the hearing officer did not require medical evidence, one way or the other, to support his findings on the period of disability. Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." This status can be established, or refuted, through lay testimony. The hearing officer evidently believed, with support, that claimant's injury was one whose effects on his ability to work were of short duration.

As to the notice issue, we do not necessarily agree that the hearing officer was precluded from considering a "good cause" exception to notice because the claimant contended he timely reported. The notice issue in this case has taken a turn of first impression; clearly, the notation made by the claimant in the safety log constitutes an adequate factual notice of injury, in that it contends that claimant hurt his back from his sacking activities. To the extent that the hearing officer found that the notice given by the claimant did not incorporate "sufficient detail," we would disagree that such a finding is supported, because this notation (the wording of which was not disputed by witnesses from the employer) plainly attributes a back injury to a function at work. It is sufficient notice along the standards set forth in DeAnda v. Home Insurance Company, 618 S.W.2d 529

(Tex. 1980). The more pertinent issue is whether notice in this fashion is adequate although not given to a person. We believe, under the facts of this case, that it was. Section 409.001(b) requires that notice of injury be given to "the employer" or "an employee of the employer who holds a supervisory or management position." We believe "the employer" includes entry into an injury log identified by the employer for this purpose, and which a vice president for the employer stated even he had used for this purpose. The fact that the employer may not read the log on a frequent basis is a matter of internal administration by the employer and does not take away from the entry as a "notice" by the employee to the employer.

There is no express appeal of the hearing officer's determination that claimant did not give timely notice. The carrier appeals only that there was good cause. While we must necessarily address all aspects of the notice issue, we will not directly reverse the determination of the hearing officer, noting that he could find good cause by trivialization (and in the claimant's understanding that he had already logged in his "no lost time" injury the day it happened). We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.- El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995.

For the reasons set forth in this decision, we affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge